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# In the Supreme Court of the United States

OCTOBER TERM, 1975

**No. 74-1560**

UNITED STATES OF AMERICA,
*Petitioner,*

vs.

AMADO MARTINEZ-FUERTE, *et al.*,
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## Brief of the American Civil Liberties Union, the Mexican American Legal Defense and Educational Fund, and the Northern California Police Practices Project, as *Amici Curiae*

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# BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE NORTHERN CALIFORNIA POLICE PRACTICES PROJECT, as AMICI CURIAE

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## INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nation-wide, non-partisan, non-profit membership organization dedicated to securing the constitutional rights of all persons. For more than fifty years, the ACLU has engaged in litigation and education which seeks to insure that all agents and agencies of government are governed by the rule of law, and that official arbitrariness touching the liberty of a free people will be restrained and curbed. The ACLU's interest in the present cases is based upon the belief that random stops of private moving vehicles for the detection of criminal suspects cannot be reconciled with Fourth Amendment limitations on arbitrary police practices.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national, non-partisan, non-profit organization established in 1968 to secure and advance the civil rights of Mexican Americans through litigation and education. The principal locus of MALDEF's activities is in the American Southwest, above the border with Mexico, from California to Texas, where the predominate share of American citizens of Mexican ancestry and lawfully admitted aliens live and work. Since its inception MALDEF has actively presented legal challenges to many indignities faced by Mexican Americans and has been particularly concerned with the treatment of Mexican Americans by police officials in connection with the enforcement of the immigration laws. Last Term MALDEF participated in the presentation of United States v. Brignoni-Ponce, ___U.S. ___, 45 L.Ed 2d 607 (1975), United States v. Ortiz, ___U.S. ___,

45 L.Ed 2d 623 (1975), Bowen v. United States, ___U.S. ___, 45 L.Ed 2d 641 (1975), and United States v. Peltier, ___U.S. ___, 45 L.Ed 2d 374 (1975), by filing a brief as amicus curiae.

MALDEF's interest in these cases arises for two reasons. First, its experience has demonstrated the deep and pervasive effect that random stops of persons of Mexican racial appearance have on the lives and spirits of America's Mexican-American population. Second, it believes that these cases provide a significant opportunity for the Court to resolve the principal remaining issues arising at immigration checks removed from the international border, and to insure that Mexican Americans are treated impartially in the enforcement of the immigration laws.

The Northern California Police Practices Project is a non-partisan, non-profit organization established in the San Francisco Bay Area of California in 1973 with the objective of developing adequate public accountability of police agencies and personnel. The Project's work has focused upon the extent to which the discretion of police officials is regulated under law. The Project's interest in these cases arises because their resolution may determine the extent to which the legal process will effectively regulate police discretion to briefly, though intrusively, detain innocent persons in the course of detecting criminal suspects outside the international border context.



## SUMMARY OF ARGUMENT

1. In each of the consolidated criminal cases before the Court, officials of the United States Border Patrol detained moving vehicles at a fixed immigration traffic checkpoint located between San Diego and Los Angeles, California, without probable cause or a founded suspicion connecting the occupants of the vehicles with immigration law violations. In each case the defendants were seized pursuant to a warrant of inspection issued by a magistrate, authorizing routine, random vehicle stops at the checkpoint. Measuring the random checkpoint practice and the warrant against constitutional proscriptions of unreasonable seizures, the Court of Appeals held the warrant invalid and found the practices it authorized in violation of the Fourth Amendment. That decision is entirely consistent with the antecedent history of the Fourth Amendment warrant clause and serves to protect all innocent travelers from frightening, arbitrary, and discriminatory law enforcement.

2. Causeless, random detentions of United States citizens and lawfully resident aliens at a fixed immigration traffic checkpoint which is neither located at an international boundary or its functional equivalent violates "[t]he right of the people to be secure in their persons, . . . against unreasonable searches and seizures . . . ." Causeless, random vehicle stops, unfounded by a reasonable suspicion to believe that occupants of the vehicles stopped are engaged in a criminal enterprise, are a wholesale intrusion on the security and privacy of law abiding motorists. Such a practice cannot be countenanced

in a society which values its democratic ideals, and requires that before government may restrain a person's movements on the highways of this land, it must be able to articulate and demonstrate that particular grounds exist justifying the restraint as to the person stopped. This standard insures that the government will focus on the person's conduct, rather than his physical appearance, status in society, or his location in an areal setting, before a forcible stop will take place. The Government's position in this case is unacceptable because it would suspend the restraint's against random intrusions by officials in the field which were previously enunciated by the Court during its last Term.

3. The warrant of inspection issued in this case -- like all such warrants -- did not and could not practically distinguish the practice at the San Clemente, California, checkpoint from the practices engaged in at any other fixed checkpoint operated by the Border Patrol without a warrant. The warrant of inspection was a form without substance; it licensed discretion rather than curbed discretion. Its approval would signal an extravagant license to intercept innocent persons on the chance of finding that they are engaged in crime.

4. Reasonable suspicion for a particular vehicle stop at a fixed checkpoint adequately accommodates the Government's needs and presents objective standards which protect the law abiding public from arbitrary intrusions on security and privacy.



## ARGUMENT

### I. INTRODUCTION

"Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" Davis v. Mississippi, 394 U.S. 721, 726-727 (1969). Last Term the Court held that "officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." United States v. Brignoni-Ponce, ___U.S. ___, 45 L.Ed 2d 607, 618 (1975). In United States v. Ortiz, ___U.S. ___, 45 L.Ed 2d 623 (1975), the Court also held that the probable cause standard imposed in Almeida-Sanchez v. United States, 413 U.S. 266 (1973) in connection with roving patrol searches near the border likewise applies to searches made at a fixed checkpoint. Now in this case, the Government urges that the Brignoni-Ponce "reasonable suspicion" standard does not apply to forcible investigatory stops at fixed checkpoints, and, alternatively, that such stops are constitutionally validated by a blanket warrant authorizing the stop of any vehicle passing through the San Clemente checkpoint which the Border Patrol, in its unfettered discretion, may choose to detain for questioning about illegal immigration activities. The Court of Appeals defined the "issue here . . . [as] whether the warrant of inspection somehow transforms otherwise unreasonable seizures into constitutional ones." 514 F.2d at 315

(footnote omitted). The Court held that it does not. 1/

The issue is of considerable significance. "The Border Patrol operates 17 permanent and 30 temporary checkpoints in California, Arizona, New Mexico, and Texas, within the jurisdiction of six different federal judicial districts." 2/ These checkpoints include the one at San Clemente, California, at issue here, "where traffic is heavy", 3/ and also, "infrequently used temporary checkpoint[s]". 4/ The Government's

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1/ Although the Court of Appeals apparently thought that both the initial "fleeting stop" (which in most instances was not a stop at all but rather involves a slow down of cars), see 514 F.2d at 315; and the subsequent, discretionary, random diversion for questioning were unconstitutional (see 514 F.2d at 311, n. 3), this case does not require resolution of the question of whether the "fleeting" stop (or slowdown) standing alone is a "seizure" subject to Fourth Amendment standards. For that reason, we focus our attention in this Brief upon the diversion for questioning, which unquestionably is a seizure within the meaning of the Fourth Amendment, as Brignoni-Ponce squarely held.

2/ Brief for Petitioner at 39.

3/ Id. at 21.

4/ Id. at 41. The checkpoint locations are fixed by the Border Patrol, and can be opened or closed at will. They are not fixed by an Act of Congress, or by binding, published administrative regulations of the Attorney General. United States v. Baca, 368 F. Supp. 398, 406 (S.D. Cal. 1973).



position rests on the assertion that "in order for a checkpoint to pose a meaningful risk of detection for even the most carefully disguised professional smuggling operations, some stops must be made on an essentially random basis." (Brief for Petitioner at 12, emphasis added.) And in these consolidated cases it is conceded that Border Patrol officers who stopped the respondents did not have "traditional probable cause or reasonable suspicion, in the sense of specific knowledge about the particular car stopped." Brief for Petitioner at 8.

As amici our joint concern is primarily two-fold: first is the pronounced effect that arbitrary stops can and will have on innocent persons of Mexican physical appearance, and lawfully admitted resident aliens, as well as all other traveling residents of the border areas where random stops are made; 5/ and second is "a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens," United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 312 (1972), especially persons of Mexican ancestry who must travel through the presently established 47 checkpoints of the Southwest. 6/ It is the "indiscrimi-

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5/ "Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well." United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 617.

6/ "Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens." United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 619.

nate official interference" 7/ of the checkpoint stop and inquiry practice, which was legitimated by the "warrant of inspection" 8/ that presents the need for special vigilance. 9/ For the arbitrary stops of traveling motorists in this case touch at "the unrestrained search for smuggled goods that brought the Fourth Amendment into being." J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 57 (Johns Hopkins University Studies in Historical and Political Science, Serv. 84, No. 1, 1966) [hereinafter cited as LANDYNSKI].

We believe that neither the fixed checkpoint nor the warrant of inspection issued in this case sufficiently restrain the indiscriminate character of the stop and inquiry practiced by the Border Patrol at these checkpoints. Its validation can be effected only by substantially eroding previously established objective standards for police stops in the Border context, an erosion which will have a serious impact on the degree of randomness tolerated in other high crime areas and situations. Accordingly, we believe that a free society cannot afford to relax the limitation of "reasonable suspicion" for a forcible stop in areas

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7/ United States v. Brignoni-Ponce, supra, ___, 45 L.Ed 2d 607, 617 (1975).

8/ Appendix at 52-53.

9/ "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these procedures that counsels a resolute loyalty to constitutional safeguards." Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973). See also Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).



removed from an international border or its functional equivalent. Nor does the Constitution itself permit the courts to issue warrants which allow the decision as to whom to stop to be made by law enforcement officers in the field without any restraints. The Fourth Amendment stands as a barrier to what was done here. It unambiguously prohibits general warrants, and requires that "warrants particuarly describ[e] the place to be searched, and the persons or things to be seized."

## II. STOPS AT FIXED CHECKPOINTS REMOVED FROM THE INTERNATIONAL BORDER OR ITS FUNCTIONAL EQUIVALENT REQUIRE REASONABLE SUSPICION DIRECTED TO THE PERSONS AND AUTOMOBILES DETAINED; RANDOM STOPS ARE UNCONSTITUIONAL.

The automobiles stopped at San Clemente and at other relatively fixed border checkpoints are not empty. They are carrying people. A predominate purpose of the Fourth Amendment is to protect those persons, and their interests. Katz v. United States, 389 U.S. 347 (1967). "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." Id. at 359. While a search at a fixed checkpoint entails a relatively greater invasion of privacy than a stop, the stop is not free from the restraint of reasonableness that can be measured against an objective standard. "[W]henever a police officer accosts an individual and restrains his freedom to . . . [drive] away, he has 'seized' that person" within the meaning of the Fourth Amendment. Terry v. Ohio, 392 U.S. 1, 16 (1968). Thus this Court held in United States v. Brignoni-Ponce,

supra, that the Border Patrol "must have a reasonable suspicion to justify roving patrol stops." 45 L.Ed 2d at 617.

The Government argues that, Brignoni-Ponce notwithstanding, forcible stops and interrogations at fixed checkpoints (as distinguished from those imposed by roving patrols) are so trivial an invasion of privacy that a foundation of reasonable suspicion need not be present. The claim, particularly in light of the Court's analysis in Brignoni-Ponce, must be rejected.

The forcible stop of a moving car is an unambiguous restraint -- even more so than detentions of immobile persons who may be stationary and then approached by a policeman for any reason ranging from a brief greeting to an abrupt pat down search for weapons. Those stationary detentions are, of course, subject to Fourth Amendment reasonableness requirements. See Adams v. Williams, 407 U.S. 143 (1972); Sibron v. New York, 392 U.S. 40 (1968). It is preposterous to argue that stops of moving automobiles by "'a Border Patrol agent in full dress uniform, standing behind a white and red "STOP" sign'" accompanied by "'official U.S. Border Patrol vehicles with flashing red lights'" (United States v. Martinez-Fuerte, 514 F.2d 308, 313 (9th Cir. 1975), quoting United States v. Baca, 368 F. Supp. 398, 411 (S.D. Cal. 1973), are not significantly different from "the interuption caused by a traffic light or a stop sign." Brief for Petitioner at 31 (and id. at 12).

Millions of cars pass through the San Clemente checkpoint every year; it is the principal wide-lane thoroughfare connecting San Diego to Los Angeles, continuing all the way to Washington State. As the Court of Appeals observed, "[t]he overwhelming majority of persons traveling north through the checkpoint are lawfully within the



country; indeed, most of them are not aliens and have not crossed the border at all." 514 F.2d at 312. The embarrassment and attending apprehension of motorists singled out for the stop and inquiry procedure -- that is, "divert[ed] . . . to a secondary inspection area where the travelers will be detained for inquiry by other agents into their citizenship and immigration status" (514 F.2d at 313) -- is not difficult to picture.

A motorist and his passengers seeing some vehicles being singled out to the secondary inspection area, watching some cars being "inspected" 10/ or searched, has no way of knowing what is about to happen to him. He sees the official uniforms, the guns (see 514 F.2d at 320) and the flashing red lights. One unfamiliar with the procedure, upon being selected for interrogation -- and seeing most other cars continue on their way -- would reasonably think and fear, "Why have I been singled out?" "What did I do wrong?" "Will I be arrested?" "Will I be held for a long time?" "Will they take apart my car?" "Perhaps I shouldn't drive on Highway 5 because what is happening will probably happen again." And once Brignoni-Ponce's restriction on stops solely based on the visible Mexican appearance of suspects is relaxed, it is not difficult to imagine the offensive result: the fear and distress of all persons with noticeable Mexican physical characteristics would be further exacerbated upon seeing countless persons of "Mexican appearance"

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10/ We have put the word inspected in quotes because the Government implies that inspections are not searches, although the Court of Appeals was unable to figure out what kinds of actions this parlance actually addressed. 514 F.2d at 313.

detained at the side of the highway. The practice will "inflict great indignity and arouse strong resentment." Terry v. Ohio, 392 U.S. 1, 17 (1968). 11/

Whether the vehicle is merely stopped, or also "inspected" or searched is no comfort, in the first instance, to the thousands of innocent motorists who could be hailed to the side of the highway. The initial embarrassment, apprehension, and humiliation at the time the stop occurs is great. Those consequences, the Government concedes, were imposed upon the occupants of 12,007 vehicles during a nine-month period at the San Clemente checkpoint -- more than three-fourths of whom were found to be wholly innocent of immigration law violations. 12/ It was for precisely these reasons that the Court in Brignoni-Ponce rejected the Government's claimed right to stop and question without reasonable suspicion, and wholly on the basis of the visible ancestry of a suspect, in the context of roving patrols; the intrusion upon privacy and security at a fixed checkpoint is of the same order.

"[T]he broad and unlimited discretion sought by the Government" (United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 617)

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11/ The Government variously describes the duration of the stop and inquiry practice as detentions "for only a few minutes" (Brief for Petitioner at 16), "no more than about five seconds per occupant", (id. at 29), "ordinarily less than a minute", (id. at 31), and "the average time consumed by a stop for questioning at San Clemente is still only three to five minutes (A. [at] 46)" (id. at 53).

12/ Brief for Petitioner at 21.



is a major and compelling reason why "checkpoint investigative stops without search, will be difficult to justify under the Fourth Amendment absent probable cause or reasonable suspicion." United States v. Ortiz, supra, 45 L.Ed 2d at 639 (Justice White dissenting).

It is a discretion which is admittedly exercised without identifiable standards by Border Patrol officers. Who gets stopped at San Clemente, and why they get stopped, was decided in each of these consolidated cases solely by the Border Patrol officer surveying and directing traffic at the checkpoint concededly without probable cause or reasonable suspicion. See Brief for Petitioner at 8.

Like other seizures, investigative stops may not constitutionally be made "in the discretion of the police" (Beck v. Ohio, 379 U.S. 89, 97 (1964)), for "unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy. . . ." United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 317 (1972). 13/ The lesson of United States v. Ortiz is clear: the Fourth Amendment is meant to "protect . . . privacy from official arbitrariness." 45 L.Ed 2d at 629. 14/

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13/ We deal in this section of the Brief with the Government's claim that no warrant is required in the checkpoint setting for forcible stops. In Part III, infra, we show that the impermissible discretion in selecting those cars for stops is no less intolerable where, as here, a general "area" warrant was issued.

14/ See following page 15 for footnote.

A seizure of the person is arbitrary when it is unsupported and unlimited by "articulable grounds for identifying violators." United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 617. That is grounds which can be explained and which distinguish the suspected violator from the general law-abiding public. "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." Terry v. Ohio, 392 U.S. 1, 21 n. 18 (1968). While "reasonable suspicion" involves a lowered degree of probability than "probable cause" the focus of the probability -- that is that the particular person or persons stopped is involved in some criminal enterprise -- remains the same. Randomness plays no role when the standard used requires a connection between the person stopped and the suspected commission of a particular crime, and when that standard requires articulation of the factors which form the grounds for a particular forcible detention.

Unchecked, wholly discretionary vehicle stops "would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention." Davis v. Mississippi, 394 U.S. 721, 726 (1969). This Court found that kind of unfettered discretion constitutionally offensive in Ortiz, noting that the Government's position in that case "would authorize the Border Patrol to search vehicles at random for

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14/ See Camara v. Municipal Court, 387 U.S. 523, 528 (1967). And see generally, Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 396, 411-412, 417, 472 n. 549 (1974).



no officer ever would have to justify his decision to search a particular car." United United States v. Ortiz, supra, 45 L.Ed 2d at 628-629. Under the scheme whose constitutionality is asserted by the Government here, the law enforcement officers' decisions cannot be rationally explained in a manner that assures a detained motorist that his having been ordered to the side of a highway is based upon lawful criteria. 15/ Further the decision is not subject to the restraint of the rule of law; it lacks specific, reasoned objective criteria altogether.

The ignominy attending the random stop of an innocent person of visible Mexican appearance is particularly acute. He can refrain from having anything to do with illegal alien traffic, he can drive carefully, he can conform to all the outward attributes of American life, but he cannot change his physical appearance. "[E]ven though the intrusion incident to a stop is modest", 16/ in the absence of restraints on the discretion of the Border Patrol, its officials could stop "all Mexican-Americans to ask if they are aliens." United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 620. That is a burden which cannot be tolerated in a free society, where Mexican-Americans, like other ethnic and racial groups have sought to enter the mainstream of America with the security

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15/ "[A]n officer, left to function on his own, understandably tends to respond to a given situation on the basis of his personal norms regarding individual group behavior." Goldstein, Police Policy Formulation: A Proposal for Improving Police Performance, 65 MICH. L. REV. 1123, 1128 (1967).

16/ United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 615.

and rights enjoyed by other Americans. 17/

The Government, however, asserts two principal reasons for upholding the random stop and inquiry procedure at San Clemente. First is the contention that Border Patrol officers at the checkpoint cannot sufficiently view an approaching vehicle in order to determine in all cases whether reasonable suspicion exists for stopping a particular vehicle. 18/ That is a curious and frightening argument, for it implies that constitutional safeguards are subject to be discarded when they cannot easily be met. Second is the asserted need to deter potential professional illegal alien smugglers by informing them of the capability to make random, causeless stops. 19/ The same was, of course, true of the stops and searches condemned in Almeida-Sanchez, Brignoni-Ponce, and Ortiz.

At the bottom of all this, however, is the Government's submission that "the unique law enforcement problem justifies an unconventional solution." Brief for Petitioner at 14-15. As amici we are particularly concerned about the creation of "unconventional" inroads on the traditional limitations on

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17/ UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT: MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST (G.P.O. 1970); A. MORALES, ANDO SANGRANDO -- A STUDY OF MEXICAN AMERICAN POLICE CONFLICT (Perspectiva Publications Press)(1972). And see, e.g., Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973); White v. Regester, 412 U.S. 755 (1973); Hernandez v. Texas, 347 U.S. 475 (1954); United States v. Mallides, 473 F.2d 859 (9th Cir. 1973).

18/ Brief for Petitioners at 21-24.

19/ Id. at 24-25.



the propriety of governmental conduct. It is not necessary to deprecate the serious governmental concerns urged in this case to reject the invitation to water-down the settled Fourth Amendment barrier against detention of an individual for questioning about matters concerning possible criminal law violations except upon probable cause, or at least, reasonable suspicion. Society's need to apprehend smugglers, although significant, is precisely the sort of conventional concern from which the Fourth Amendment was born. See Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971); Berger v. New York, 388 U.S. 41, 58 (1967); Stanford v. Texas, 379 U.S. 476, 481-486 (1965); Henry v. United States, 361 U.S. 98, 100-101 (1959); Boyd v. United States, 116 U.S. 616, 624-630 (1886). 20/ Stopping cars, without cause, and without limitation, in the interior United States, for such purposes presents an unwarranted regimentation of American life which should not be countenanced merely on principles of expediency.

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20/ Ever since Lord Camden decided in Entick v. Carrington, 19 Howell St. Tr. 1029 (1765), that "[t]he mere need to solve crimes . . . did not allow the law to place its own enforcement above other values," LANDYNSKI, supra, p. 9, at 59-60, the Court has resisted such blandishments in Fourth Amendment cases, e.g., United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 318-321 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 445, 454-455 (1971). One commentator has noted that in border area cases "the government always presents its case as one of great need." Note, Area Search Warrants in Border Zones, 84 YALE L. REV. 355, 371 (1974).

It is genuinely appropriate to ask how a rule such as that contended for by the Government here can possibly remain confined to checkpoint border stops. If law enforcement officers may randomly detain vehicles and their occupants in their search for illegal aliens at a fixed checkpoint 66 road miles north of the border, may they randomly stop and interrogate (and, presumably pat-search under Terry v. Ohio, supra) in so-called "high crime" areas? May they stop, question and administer tests for intoxication to drivers randomly stopped on a Saturday night? Could shoppers walking or driving in the downtown shopping district during a wave of shoplifting be detained randomly and asked to produce evidence that they paid for the merchandise in their possession? See p. 29, infra, at note 28 . And if the answer is that under Brignoni-Ponce they may not, would (and should) the result be different if the stops are performed at a fixed checkpoint, flashing red lights and all? The requirement of individualized suspicion as a predicate for detention has heretofore stood as a barrier to such overreaching conduct even though law-breaking which might have been identified through its use may go undetected.

In any event, the Government's concern that "a requirement of reasonable suspicion would be unworkable at a checkpoint (Brief for Petitioner at 26) is highly conjectural in light of this Court's finding that "the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators." United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 617. What is interesting about the Government's position is that it says that the way things are done at the checkpoint -- the way the "point" officer screens the traffic -- is somehow immutable, and there are no alter-



native methods of screening traffic. The Border Patrol has not even attempted to adjust its checkpoint operational practices to the recently imposed reasonable suspicion standard. 21/ Surely, the constitutional requirement of reasonable suspicion should not be scrapped simply because the Government does not wish to put that standard into practice at a checkpoint by rethinking the manner in which vehicles are selected for stops. Modification of the existing set-up at the checkpoints, by increased usage of spotter patrols before the checkpoint, or moving patrols after the checkpoints, is a constitutionally more acceptable solution than wholesale, random intrusions on the security and privacy of travelers with visible Mexican characteristics, and all other innocent motorists.

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21/ See Brief for Petitioner at 24-25:

> "After the Ninth Circuit's decision in the present case, in effect imposing a reasonable suspicion requirement for checkpoint stops, and in light of the Ninth Circuit's rulings on the contours of the 'founded suspicion' concept . . ., the Border Patrol felt it had little choice but to abandon most checkpoint operations in California and Arizona." (Footnote omitted.)

Both the Fifth and Tenth Circuits have refused to impose the reasonable suspicion standard at checkpoints. So the Government has had no need to try it in those circuits. United States v. Santibanez, 517 F.2d 922 (5th Cir. 1975); Sifuentes v. United States, cert. granted, No. 75-5387, Nov. 11, 1975; United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973).

The deterrence rationale -- that is, that "[t]he checkpoint acts as a powerful deterrent to illegal entry and transportation of aliens" 22/ -- is true of any overreaching law enforcement tool. The problem is that checkpoints, like other forms of unlimited surveillance power, take the good with the bad, the innocent as well as the suspicious, the vacationing motorist and the professional smuggler. Three-fourths of the motorists detained at San Clemente, in a nine month period prior to the warrant, the Government acknowledges, were not found to be in violation of the immigration laws. Brief for Petitioner at 21. And only about one-fifth of the cars stopped under the warrant of inspection contained deportable aliens. Appendix at 55. For persons of Mexican appearance, the burdens of this process are obviously disproportionate. For them especially, but for other persons as well, "[t]he price of lawful . . . [use of the highways] must not be a dread of subjection to an unchecked surveillance power." United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 314 (1972). The number of innocent motorists who would be stopped simply because their visible appearance and conduct resembles that of a well-practiced professional smuggler -- that is, whose conduct appears wholly innocuous and lawful -- is too high a price to pay.

Our society could apprehend more miscreants, and deter potential ones, by imposing checkpoints, dragnets, and arbitrary stops of the public to detect crime, but such a regime would change our society as we know it today. See, Brinegar v. United States, 338 U.S. 160, 180-181 (1949) (Jus-

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22/ Brief for Petitioner at 16.



tice Jackson dissenting). Moreover, in the context of vehicle stops at fixed checkpoints, some illegal aliens will slip through even the most comprehensive sieve that the Government can feasibly impose. See Brief for Petitioner at 11-12, 14, 20, 41-42, 54-55. The benefit to the Government of increasing the surveillance authority to make random stops is at best marginal; the intrusion on the privacy and security of all travelers would be immeasurable.

## III. THE WARRANT OF INSPECTION WAS UNLAWFUL AND DOES NOT VALIDATE A FORCIBLE DETENTION FOR QUESTIONING MADE WITHOUT REASONABLE SUSPICION

In the preceding portion of this Brief we have focused on the causeless, random stops of particular motorists at checkpoints removed from the international border or its functional equivalent. The Government argues that these stops can be validated by a warrant. We are not here concerned with the theoretical basis for the warrant requirement generally, since it is the time-tested constitutional means of insuring that searches and seizures are based upon appropriate factual prerequisites, and it confines otherwise unchecked law enforcement discretion. We are concerned, however, with the practical consequence of a warrant of the type issued in this case. And we are concerned about the unlimited abuse of potentially similar warrants that could issue in non-border contexts to seek out law violators, if warrants of the sort involved in this case, which do not focus on particularized circumstances, should receive the Court's approval.

It is useful to recall that the "hated writs of assistance", Stanford v. Texas, 379 U.S. 476, 481 (1965) -- warrants issued to intercept smuggled goods in the American Colonies 23/ -- helped to kindle the American revolution and led to the creation of the constitutional limitation that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." "The warrant clause of the Fourth Amendment is not dead language." United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 315 (1972).

The writs of assistance had an uncanny resemblance to the "warrant of inspection" that is at issue in this case; both were meant to intercept smugglers. The primary lession of the history of the writs and succeeding decisions of the Court is that while the warrant is "an important working part of our machinery of government," United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 316 (1972), the mere issuance of a warrant does not necessarily avoid impermissible invasions of that privacy protected by the Fourth Amendment. Indeed, a warrant may not authorize that which the constitution prohibits. See, e.g., Berger v. New York, supra; Stanford v. Texas, supra; Marcus v. Search Warrant, 367 U.S. 476 (1965). Cf. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Aguilar v. Texas, 378 U.S. 108 (1964); Giordenello v. United States, 357 U.S. 480

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23/ See LANDYNSKI, supra, p. 9 , at 32-38; Dickerson, Writs of Assistance as a Cause of the Revolution, in R. Morris (ed.), THE ERA OF THE AMERICAN REVOLUTION 40-75 (1939); and text at p. 18, supra.



(1958). The issuance of the warrant of inspection in this case fails -- as do all such warrants -- to prevent the abuses that the Fourth Amendment restrains.

First, the issuance of the warrant of inspection for the San Clemente checkpoint did not curb the abuses inherent in the fixed checkpoint operations that we addressed in the previous section of this Brief. The situs of the checkpoint was fixed by the warrant, but it otherwise provides no standards and imposed no limitations. Who would be stopped and who would not was wholly left to "the discretion of the official in the field." Camara v. Municipal Court, 387 U.S. 523, 532 (1967). See United States v. Ortiz, supra, 45 L.Ed 2d at 628. Nor did it sufficiently serve to prevent random stops based solely on the visible Mexican physical appearance of law abiding motorists. With the exception of the tabulation of statistical information required by the return to the San Clemente warrant, its practical effects did not differ from other fixed checkpoints operated by the Border Patrol.

"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196 (1927). See also Berger v. New York, 388 U.S. 41, 58 (1967); Stanford v. Texas, 379 U.S. 476, 485 (1965). The "demand for specificity" (Terry v. Ohio, 392 U.S. 1, 21, n. 18 (1968)) 24/ should not

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24/ See Beck v. Ohio, 379 U.S. 89, 97 (1964).

and cannot be abandoned in the context of vehicle stops at fixed checkpoints. "[T]he notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context." Id. at 20.

The warrant of inspection issued in this case was evidence of a policy determination by a magistrate that the situs at San Clemente is appropriate for screening moving vehicles; but the warrant is so unspecific in content that its practical consequences are readily ambiguous. While a motorist who is detained might learn after being stopped that the enforcement of the immigration statutes at that location has been approved by a magistrate, he gets little comfort since he is the one who is stopped and questioned, unlike most other motorists who are free to go on their way. And he gets no assurance that the stop of his car was not based on inappropriate factors, or that he will not be stopped, without cause, over again in the immediate future. He does not know whether the warrant prevents "routine" harassment each and every time he travels from San Diego to Los Angeles by car. Nor does he know whether the warrant even governs the regularity of the routine. 25/

Second, this warrant of inspection was not suitably restricted either in terms of the procedures to be used in its execu-

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25/ It is difficult to imagine that a warrant that is renewed 26 times, (see 514 F.2d at 312) containing wholly ambiguous language, authorizing the stops of thousands of cars, "involved the appropriate limiting circumstances" envisioned by Mr. Justice Powell in this concurring opinion in Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973).



tion, or in ensuring that an appropriate return to it could adequately check illegal abuses. In the nature of things it could not have been otherwise. The warrant commanded Border Patrol officers "to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles" and "to conduct a routine inspection of said vehicles for the presence of aliens," Appendix at 52-53. 26/

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26/ The initial problem is with the word "routine." The term may imply continuation of habitual practices; but on this record it does not appear to incorporate "reasonable legislative standards for conducting an area inspection", Camara v. Municipal Court, 387 U.S. 523, 538 (1967); it provides no guidance for objective reference to insure uniformity of compliance by all officers, at all times of the day or night; nor does it require that "the stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' [Terry v. Ohio,] 392 U.S., at 29". United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 617. It does not insure the regularity of "routine" established by law. Indeed, the warrant could be used as a "passkey" for generalized inquiries and "inspections" and searches, see Berger v. New York, 388 U.S. 41, 57 (1967), and as a means of institutionalizing harassment of some individuals. The warrant authorizes what was disallowed in Brignoni-Ponce.

The secondary problem is with the word "inspection." Although this term was deleted from the text of the 25 renewals of the warrant, preceding the Ninth Circuit's deci-

Footnote continued.

The lack of any limiting means of checking against the warrant is illustrated by the return to the warrant. The return, see Appendix at 54-58, tells nothing about how the officers performed their functions. The magistrate did learn that only 171 of 820 vehicles stopped in 124 hours and 10 minutes had "aliens" in them. He learned that 202 vehicles were "inspected." Appen-

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Footnote 26 continued.

sion in this case (514 F.2d at 311, n. 3), it illustrates the ambiguity of the actual warrant used to intercept the respondents in this case, and to detain 649 innocent vehicles in 124 hours and 10 minutes. See Appendix at 57. The Government admits that "it was not clear whether 'inspection' was intended to imply 'search', and in any event the Border Patrol did not conduct routine searches of the interior of vehicles." (Brief for Petitioner at 43, n.14, emphasis added). Clearly, the term "inspection" as understood by the Border Patrol means something more than "plain view" perusal of a car, since the interior passenger compartment of most cars stopped would be in plain view, and only 202 of 820 cars stopped were "inspected." If the Government, along with the Court of Appeals (see 514 F.2d at 313) could not understand what this vague term did authorize, it gives little protection to the innocent motorist who could be, and was, subjected to its vague terms. See Appendix at 54-58.

In essence, there is no assurance in this warrant, or on this record, that motorists "who may be mistaken for aliens" United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 618, will know what is authorized by it, or that an officer's decisions and practices can be governed by it or checked against it.



dix at 57. But the Magistrate did not learn what caused the stops in the first place: whether persons of Mexican appearance were being singled out for no apparent reason except their appearance, nor whether any other impermissible criteria served as the sole basis for a stop. It is plain that these aspects were not dealt with because the Magistrate accepted the Government's view that these concerns are constitutionally irrelevant. Hence, the Magistrate had no control over what was going on at San Clemente.

Lord Mansfield summed up this evil in Leach v. Three of the King's Messengers, 19 Howell St. Tr. 1001, 1027 (1765) -- as recently quoted by the Court 27/ when he pronounced:

> "'It is not fit,' . . .'that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer.'"

"In short, the . . . [warrant's] blanket grant of permission to [stop and inspect] . . . is without adequate judicial supervision or protective procedures." Berger v. New York, 388 U.S. 41, 60 (1967). It "leaves too much to the discretion of the officer executing the order." Id. at 59.

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27/ United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 316 (1972).

These are not insignificant concerns where millions of cars pass the checkpoint in a year, and thousands pass through in a week. When literally millions of discretionary decisions are being made it is inconceivable that the Constitution does nothing to control those decisions, or even provide standards for their review. But a warrant that authorizes detention or "inspection" of all persons in an area, or who pass by a single point, cannot do otherwise.

Third, approval of warrants of inspection could signal an extravagant license for stopping vehicles and pedestrians, without probable cause or reasonable suspicion, without "facts . . . judged against an objective standard," Terry v. Ohio, 392 U.S. 1, 21-22 (1968), which would enable effective judicial supervision, in other Border related contexts, as well as high crime areas of urban cities. 28/ This warrant issued on the premise that there was "probable cause to believe that mass violations of the Immigration laws . . . have been and are being committed" at the San Clemente checkpoint. Appendix at 52. The checkpoint itself is 66 road miles from the Border. But there is no discernable means of limiting inspection warrants to the presently existing checkpoints in the American Southwest which are not functional equivalents of the border. Forty-seven checkpoints could become 50 or 100; warrants could be issued for points 800 miles from the border (see United States v. Grando, 453 F.2d 769 (10th Cir. 1972); United States v. Saldana, 453 F.2d 352 (10th Cir. 1972)), or on bus lines near the Border with Canada (see United States v. Barbera, 514 F.2d 294 (2nd Cir. 1975)), or for San Francisco's Chinatown or New York's Little Italy, (see United States v. Karathanos, 399 F. Supp. 185 (E.D. N.Y. 1975)) so long as there was reason to believe that "massive" immigration violations were occurring.

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28/ "For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant is 'reasonable' only when there is 'probable cause' to believe they will be uncovered in a particular dwelling." Camara v. Municipal Court, 387 U.S. 523, 535 (1967). See, e.g., Henry v. United States, 361 U.S. 98, 104 (1959); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).



Moreover, under the principles urged by the Government to justify this warrant local law enforcement officials could get areal warrants, or class warrants, or road warrants, or neighborhood warrants to intercept the movements of suspected criminals in previously established high crime areas. "The fact that innocent activity occurs in a high crime area provides no basis for converting innocuous conduct into suspicious activity." Chapman and Kane, Illegal Aliens and Enforcement: Present Practices and Proposed Legislation, 8 U. CALIF., DAVIS L. REV. 127, 142 (1975). Although the character of the area is relevant to the inferences that may be drawn from information about a particular individual's conduct, compare, Adams v. Williams, 407 U.S. 143, 147-148 (1972), with Sibron v. New York, 392 U.S. 40, 62 (1968), blanket warrants would undue previous protections vouchsafed to innocent individuals who live, work, or travel through high crime areas. Cf. Papachristou v. City of Jacksonville, 405 U.S. 156, 159 (1972). Giving this kind of sweeping discretion to the police

-- even under a warrant -- "would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." Johnson v. United States, 333 U.S. 10, 17 (1948).

We recognize, of course, that Justice Powell's concurring opinion in Almeida-Sanchez suggested the possibility of a constitutionally valid warrant authorizing the search of all vehicles found within a particular area. While for all the reasons just stated we respectfully disagree with that suggestion, that question need not necessarily be reached, for as the Court of Appeals concluded, "the San Clemente checkpoint does not meet the standards sketched by Justice Powell. . . ." 514 F.2d at 321. In context, the area warrant proposed in Justice Powell's opinion contemplated a location much nearer the border than San Clemente and one which, either because of its remoteness or other factors, would be unlikely to see large numbers of innocent persons swept into the net. See 413 U.S. at 284, n. 4. At the San Clemente checkpoint, at least three-fourths of the vehicles detained are not found to be involved in immigration law violations. The invasion of the privacy of all these innocent persons seems far more sweeping than anything contemplated by Justice Powell's original suggestion.

It is urged that Camara v. Municipal Court, 387 U.S. 523 (1967) validates warrants of the type issued in this case. In Camara, the Court overruled its earlier holding in Frank v. Maryland, 359 U.S. 360 (1959) in which it had held that administrative inspections made for the purpose of determining whether urban housing met health, fire and other code standards did not require a warrant. The Court held that a warrant was required, but concluded that



if consent is refused the search warrant can issue without a showing of probable cause that the particular dwelling is in violation of the housing code. For several reasons, Camara is not controlling.

First, Camara did not (as is sometimes suggested) hold that an area warrant can be issued. Camara contemplated, quite to the contrary, that a warrant would not issue until there had been a request for entry 29/ and a consideration of the individualized circumstances of the proposed search. The magistrate must focus on whether "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." Id. at 538 (emphasis added). In this way there is prior judicial consideration of "whether enforcement of the municipal code involved requires inspection . . . of [the individual] premises, . . . the lawful limits of the inspector's power to search, and . . . whether the inspector himself is acting under proper authorization." Id. at 532. Camara is thus consistent with the express command of the Fourth Amendment that warrants "particularly describ[e] the place to be searched, and the persons . . . to be seized." Warrants of the type issued here cannot satisfy that unambiguous constitutional standard. In contrast, the warrant here authorized the seizure of all persons, within the Border Patrol's absolute and uncontrolled discretion, who pass by the checkpoint.

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29/ "Thus, as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry." Camara v. Municipal Court, supra, 387 U.S. at 539-540.

Second, Camara condemned the very discretion which this warrant conferred. As the Court there said of the system of searches before it: "The practical effect . . . is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested third party warrant the need to search." Id. at 532.

Third, the procedures used here are part of the mechanism by which criminal laws are enforced. It is true, of course, that many aliens are simply deported, for prosecution of each violation detected would clog the federal courts. But the matters under investigation are no less criminal; moreover, as the Court of Appeals noted, "the government does seek to prosecute virtually all smugglers of illegal aliens." 514 F.2d at 320. Indeed, this very case is a criminal prosecution, as were those which have preceded it in this Court. That is entirely different from the civil, code-compliance procedures which were at the heart of Camara. While criminal prosecution in some instances might have been available, that plainly was not the thrust of the municipal procedures with which the Court was concerned. To the contrary, the entire thrust of the search there was to detect health and safety hazards which might well not even be known to the occupant of the dwelling. As the Court said in Camara, "such conditions . . . indeed may not be apparent to the inexpert occupant himself." 387 U.S. at 537. For that reason, Camara-type inspections "are neither personal in nature [30/] nor aimed

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30/ The Court's characterization of the search as not "personal in nature" is a further point of distinction. There the ob-

Footnote continued.



at the discovery of evidence of crime." (id.).

Plainly, the warrant of inspection in this case could not substitute for the constitutional and practical restraint imposed by a reasonable suspicion standard which can be used in the situation at San Clemente, where law enforcement decisions to stop a motorist must be made under exigent circumstances, leaving no time to obtain a traditional warrant for the particular car to be stopped. This "approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity" of the Fourth Amendment warrant clause. Camara v. Municipal Court, supra, 387 U.S. at 539. This approach prevents the abuses proscribed by Brignoni-Ponce.

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Footnote 30/continued.

ject of the search was a dwelling; here the object was the detection of persons engaged in illegal conduct.

## CONCLUSION

"[A] requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference." United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 617. The checkpoint fails to limit "to any meaningful extent the officer's discretion to select cars," United States v. Ortiz, supra, 45 L.Ed 2d at 628 (1975). The authorization of the warrant of inspection to "stop every automobile on the chance of finding" an illegal alien in it is "intolerable and unreasonable," Carroll v. United States, 267 U.S. 132, 153-154 (1925).

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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